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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. 1203

316 U.S. # 16

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MARGUERITE LEVY, EXECUTRIX OF THE ESTATE OF WILLIAM LEVY, DECEASED,
Petitioner,

vs.

NATIONAL BATTERY COMPANY, A CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JOSIAH E. BRILL,
SAMUEL H. MASLON,
500 Builders Exchange,
Minneapolis, Minnesota,
Counsel for Petitioner.

Hayward Brief Co., 601-7 Fourth Ave. So., Minneapolis

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NATIONAL BATTERY COMPANY, A CORPORATION, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The above named petitioner, by the undersigned, her attorneys, respectfully prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Eighth Circuit, entered March 2, 1942 (R. 179), reversing (by a divided court) the judgment of the District Court of the United States for the District of Minnesota, entered April 17, 1941, made final June 19, 1941 (R. 154-5).

OPINIONS BELOW

The District Court wrote no formal opinion in the case. It wrote a memorandum on the motion of the defendant for judgment notwithstanding the verdict and in the alternative for a new trial. Respecting the *only* point involved in this petition and in the opinion of the Circuit Court of Appeals,

the lower Court denied error in receiving exhibits hereinafter referred to as "Exhibits T and U" (in reliance upon *Guile vs. Greenberg*, 192 Minn. 548, 257 N. W. 649) (R. 161-2).

The opinion of the Circuit Court of Appeals reversed the lower Court and granted a new trial upon the sole ground that Exhibits T and U should not have been received in evidence, under the doctrine of *Guile vs. Greenberg*.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered March 2, 1942 (R. 179). A petition for re-hearing was denied, without opinion, on March 26, 1942 (R. 197). The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

STATEMENT

Appellee sued the appellant in the United States District Court for the District of Minnesota, Third Division, for damages for negligently causing the death of her husband. Jurisdiction was acquired by the Federal Court by reason of the diversity of citizenship existing between the parties to the action (R. 5-6). The jury returned a verdict in favor of appellee in the sum of seven thousand dollars ($7,000.00) (R. 154-5).

After the denial of a motion for judgment notwithstanding the verdict or for a new trial, the appellant appealed to the Circuit Court of Appeals for the Eighth Circuit, which sustained the judgment entered upon the verdict on all issues except one, and reversed the judgment entered upon the verdict and remanded the case for a new trial upon the sole ground that there was prejudicial error in receiving two exhibits, known as "Exhibits T and U," on the ground that

those exhibits were not admissible under the law of Minnesota where the cause of action arose and the case was tried.

The Circuit Court of Appeals, in arriving at its conclusion with respect to *this one question*, recognized that the Court below had limited the jury in the consideration of the questioned exhibits to their effect as admissions against interest on the issue as to whether or not the appellant's employee, Sullivan, was acting within the course and scope of his employment at the time of the negligence which resulted in the death of both Levy and Sullivan (R. 174); the Circuit Court properly enunciated the proposition that if either the federal rule or the rule prevailing in the state where the case was tried favored the admission of such evidence, the evidence was properly received (R. 175). The Circuit Court then proceeded to cite federal cases dealing exclusively with the proposition that the "purchase of peace" by the making of a compromise settlement of an unliquidated claim is not admissible in evidence as an admission against interest, because of the established policy of the Courts to encourage the purchase of peace by compromise settlements (R. 175-6). The Circuit Court wholly overlooked the fact that it was concerned with a case where there was a payment in full on the liquidated claim (to the fraction of a penny), and that the amount of the claim so paid was fixed by statute. It failed wholly to indicate on what theory such a payment could conceivably come within the compromise settlement rule under either federal or state decisions.

In the Court below, and in the Circuit Court, as indicated by the appellant's brief, the appellant's position was that we were here dealing with a compromise settlement, and not with the payment in full of a liquidated claim. The appellee took the position that the exhibits were admissible upon the ground that they did *not* come within the exception to the general rule that admissions against interest were

relevant, this because they were evidence of a payment in full of a liquidated claim. The Circuit Court failed to resolve this controversy, but seems to have ignored it, although citing authorities relating to the "purchase of peace" by compromise settlement.

The Circuit Court, by this process, arrived at the conclusion that the federal authorities made Exhibits T and U inadmissible, and then proceeded to discuss the question of whether or not a more favorable rule on the question existed in Minnesota under Minnesota decisions, recognizing that if the Minnesota decisions favored the admissibility of the exhibits they would prevail over the federal decisions (R. 176). In arriving at the conclusion that Exhibits T and U were inadmissible under Minnesota decisions, the Court reached its conclusion solely upon the basis of the Minnesota case of *Guile vs. Greenberg,* 192 Minn. 548, 257 N. W. 649 (R. 176-8). In this connection (R. 177), the Court said:

> "Assuming, but not deciding, that the same rule of compentency applies both to the admissibility of an expressly agreed incidental fact involved in a proceeding in another tribunal and to a fact in issue but implied only from the settlement and payment of a claim filed in a proceeding pending before another tribunal, still we are of the opinion that the decision in the Guile case does not support the appellee's contention. *On the other hand, we think the rule applied in the Guile case requires the exclusion of Exhibits T and U in the present case.*"

(All italics supplied.)

We shall show, as we respectfully submit, that the *implication* of the foregoing statement, that *implied* admissions may not be properly received under circumstances where direct admissions may be, is contrary to the law in Minnesota, which controls. (*Erie vs. Tompkins.*)

The material facts concerning Exhibits T and U (R. 72-

82) are that they consisted of documents filed by appellant, Sullivan's employer, under the Workmen's Compensation Act of Minnesota, in connection with a claim by the dependents of Sullivan, who was killed in the same accident, which documents stated two material things:

(a) That the appellant denied liability for Workmen's Compensation, and denied that Sullivan was acting in the course and scope of his employment at the time of the accident, out of which he died.

(b) These documents also stated, as found by the Circuit Court of Appeals in its opinion, that "the claim was settled by the appellant herein as Sullivan's employer, *by the payment of the full amount* to which claimants were entitled under the law, if entitled to anything."

QUESTIONS PRESENTED

1. Was the law in Minnesota, as declared by its Supreme Court, such as to make the evidence of Exhibits T and U admissible, or did such decisions make them inadmissible?

2. Is there any distinction under the law in Minnesota between "the admissibility of an expressly agreed incidental fact involved in a proceeding in another tribunal" and "a fact in issue but implied only from the settlement and payment of a claim filed in a proceeding pending before another tribunal"?

3. Do the Federal authorities cited by the Court on the question of the admissibility of evidence of a compromise settlement have any bearing whatsoever on the propriety of the decision of the Circuit Court of Appeals?

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that the case of *Guile vs. Greenberg,* 192 Minn. 548, 257 N. W. 649, "does not support the appellee's contention."

2. In holding that the case of *Guile vs. Greenberg,* 192 Minn. 548, 257 N. W. 649, "requires exclusion of Exhibits T and U in the present case."

3. In failing to follow Rule 43 (a) of Federal Rules of Civil Procedure, by the authority of which Exhibits T and U were admissible if the decisions of the Minnesota Courts favored *or failed to exclude them* from admissibility.

4. In failing to follow the law in Minnesota to the effect, that an admission, is only a piece of evidence discrediting the party presenting a claim and tending to prove the fact of its incorrectness, and by acting as though, although not asserting, that the exception to this rule with respect to the "purchase of peace" by a compromise settlement of an unliquidated claim is broad enough to include the payment in full of a liquidated claim, the amount of the claim being fixed by statute.

5. In its indication that an implied admission against interest may not be received under circumstances where a direct admission would be properly received.

6. In denying the petition for a re-hearing.

7. In reversing the judgment of the District Court.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

I.

In Construing the Decisions of the Supreme Court of the State of Minnesota on the Sole Issue With Which We Are Concerned, i. e., the Admissibility of Exhibits T and U, the Circuit Court of Appeals in Effect So Flagrantly Misread and Misapplied the Law of Minnesota That It May Be Accurately Said That, Even Though the Circuit Court of Appeals Did Not Expressly Refuse to Follow Minnesota Law, by Which It Was Bound, in Practical Effect It Did the Equivalent.

(a) This presents the question of whether a clear failure to follow the law of Minnesota, by which the Court was bound, will deprive us of a right to a writ of certiorari, where a *straightforward and frank refusal* to follow the law of Minnesota would have justified it. If so clear a failure to follow the binding law of Minnesota Courts as will hereinafter be made manifest will prevent the granting of a writ of certiorari, then the rules by which the Circuit Court is bound may be emasculated with impunity.

(b) The Court in its opinion conceded it was bound to follow the rule in Minnesota. That it was so bound, see *U. S. C. A.*, Title 28, Sec. 725; *Fidelity Union Trust Co., et al., vs. Field,* 311 U. S. 169, 61 Sup. Ct. Rep. 176; *West, et al., vs. American Telephone & Telegraph Co.,* 311 U. S. 223, 61 Sup. Ct. Rep. 179; *Six Companies of California, et al., vs. Joint Highway Dist. No. 13 of State of California,* 311 U. S. 180, 61 Sup. Ct. Rep. 186; *Stoner vs. New York Life Ins. Co.,* 311 U. S. 464, 61 Sup. Ct. Rep. 336; *Vandenbark vs. Owens-Illinois Glass Co.,* 311 U. S. 538, 61 Sup. Ct. Rep. 347; *The City Company of New York, Petitioner, vs. Jay S. Stern,* 312

U. S. 666, 61 Sup. Ct. Rep. 823.

The Circuit Court of Appeals, in its opinion, agreed with appellee that the amount of the claim of Sullivan's dependents was not *compromised*, but, on the contrary, was *paid in full*. Its language was as follows:

> "The claim was settled by the appellant herein, as Sullivan's employer, by the payment of the full amount to which the claimants were entitled under the law, if entitled to anything" (R. 174).

The appellee's position was that a payment in full of claims arising by virtue of the same accident was evidence of an admission by the appellant that Sullivan was acting within the course and scope of his employment at the time in question. It is undisputed that, unless Sullivan was so acting, the claimants in the compensation case would have been legally entitled to nothing.

We pass the discussion of the federal cases cited by the Circuit Court of Appeals in its opinion, for the reason that all dealt with admissibility of proof of *compromise settlement* of *unliquidated* claims as an admission against interest, and not with *payment in full* as an admission against interest. We pass them for the further reason that we are content to rely upon the law in Minnesota, since that controls and it is favorable to the admission of the evidence in question.

The Minnesota as well as the universal law makes admissions against interest relevant as against an opponent's position in a lawsuit.

> *Wigmore on Evidence*, 3rd Ed., Sec. 1048, and cases cited.

Where plaintiff testifies to the amount of his damages, he may be asked on cross examination if he has not estimated and stated to certain parties the amount of his damages, and

where defendant offers to prove that plaintiff had theretofore estimated and stated his damages to be a lesser amount, the Court held it was reversible error to refuse the offer, saying:

> "Such testimony was admissible for impeachment purposes and as tending to discredit the testimony of plaintiff as to the amount of damages."
>
> *H. H. Flor vs. A. C. Buck*, 189 Minn. 131, 248 N. W. 743.

In *Anne Eluess vs. Prudential Insurance Company of America*, 190 Minn. 169, 251 N. W. 183, the Court held that it was error to refuse in evidence the proofs of death submitted by the beneficiary of an insurance policy, as admission against interest, even though the beneficiary did not know the character of the statements contained in the proofs, quoting with approval the following quotation from 2 *Wigmore on Evidence*, 2nd Ed., Sec. 1073 (4), as follows:

> "the party's *use of a document* made by a third person will frequently amount to an approval of its statements as correct, and thus it may be received against him as an admission by adoption."

The Court continued and said:

> "The use of the statement is not an estoppel; it is an admission."

That a party's books may always be received in evidence against him as admissions and that copies of a party's income tax returns may be received against him as admissions, is determined in *Leonard Wentz vs. Guaranteed Sand & Gravel Company*, 205 Minn. 611, 287 N. W. 113. That the rule referred to is universal, is supported by the statement in *Wigmore on Evidence*, 3rd Ed., Vol. 4, Sec. 1048, as follows:

> "the statements made out of court by a party-opponent are universally deemed admissible when offered against him."

Wigmore also states in the same volume, Sec. 1052:

> "An admission may be *express* or *implied, i. e.*, it may take place in the form of uttered words of statement, or in the form of conduct from which is inferred a belief that would be represented by admissory statement."

Under the same section, subdivision (b), he states:

> "*The implied admission* is reached indirectly, *i. e.*, by inference from some *conduct* to the supposed mental state of belief beneath it, this mental state when defined in words being (more or less loosely) inconsistent with the party's claim (*e. g.*, flight, falsehood, bribery, etc.)."

Referring to offers to compromise as an exception to the *universal* rule, above referred to, Wigmore in this same volume, under Sec. 1061 (c), says:

> "The true reason for excluding an offer of compromise is that it *does not* ordinarily proceed from and *imply a specific belief that the adversary's claim is well founded*, but rather a belief that the further prosecution of that claim, whether well founded or not, would in any event cause such annoyance as is preferably avoided by the payment of the sum offered. In short, the offer implies merely a desire for peace, not a concession of wrong done."

In discussing the same subject as exemplified by the state of the law in various jurisdictions, Mr. Wigmore under Sec. 1062, subdivision headed *Minnesota*, refers to *Person vs. Bowe*, 79 Minn. 238, 82 N. W. 480, in the following words:

> "offer of payment, admitted on the facts."

Lawrence P. McManus vs. Nichols-Chisholm Lumber Company, 117 N. W. 223, 105 Minn. 144, is a case in which the Court said:

> "All admissions by a party, made outside the record, if relevant to the issue, are admissible in evidence, and such evidence has a two-fold effect. It tends, as does

other competent evidence, to prove the fact in issue to which the admissions relate, and where they contradict the testimony of the party the evidence tends to discredit him; or, in other words, such evidence is admissible to prove the fact admitted and to discredit the party. Such admissions, however, unlike those which are a part of the record, are not necessarily conclusive of the fact to which they relate. The evidence tending to prove them is to be received and considered in connection with all other evidence relevant to the issue. 2 *Wigmore, Ev.*, §1048; 16 *Cyc.* 939; *Sullivan vs. Murphy*, 23 Minn. 6; *Hosford vs. Rowe*, 41 Minn. 245, 42 N. W. 1018; *Mathews vs. Great Northern Ry. Co.*, 81 Minn. 363, 84 N. W. 101, 83 Am. St. 383; *Taylor vs. Grand Lodge, A. O. U. W.*, 101 Minn. 72, 111 N. W. 919, 11 L. R. A. (N. S.) 92, 118 Am. St. 606."

The rule in the Federal Courts on this subject is stated clearly in *Phoenix Assur. Co., Limited, of London, England, vs. Davis*, 67 Fed. (2nd) 824. It is there stated not only that admissions against interest may be received generally, but the Court added that where the evidence is objected to on the ground that the alleged admission was made as a part of an offer of compromise, that:

"It is ordinarily the duty of the judge to rule upon the admissibility of evidence, that being a question of law."

The Court continued:

"When the decision involves a preliminary question of fact, as whether a confession in a criminal case was freely and voluntarily made, or whether an alleged dying declaration was made *in articulo mortis* by one conscious of his condition, the judge passes on it. But if the evidence on such a preliminary question is in conflict, it may be referred to the jury with proper instructions. *Wilson vs. United States*, 162 U. S., at page 624, 16 S. Ct. 895, 40 L. Ed. 1090; *Dawson vs. State*, 59 Ga. 334; *Irby vs. State*, 95 Ga. 467, 20 S. E. 218; *Varnedoe vs. State*, 75 Ga. 181, 58 Am. Rep. 465; *Anderson vs. State*, 117 Ga. 255, 43 S. E. 835. In like manner in a civil case when there is serious dispute whether a fact

was admitted because it was true or whether it was a concession to buy peace, that is, an attempt at compromise, the question may be submitted to the jury with instructions to disregard it, if the latter. *Chamberlayne on Evidence*, No. 1454; *Donley vs. Bailey*, 48 Colo. 373, 110 P. 65; 22 *C. J.*, §351; *Webber vs. Dunn*, 71 Me. 331; *Prussel vs. Knowles*, 4 How. (Miss) 90; *Hall vs. Brown*, 58 N. H. 93; *Colburn vs. Groton*, 66 N. H. 151, 28 A. 95, 22 L. R. A. 763. By the weight of authority even though a compromise be on foot and the offer of compromise be itself not evidence, yet an admission in that connection of a fact separate from the offer may be received."

In the case of *Travelers Ins. Co. vs. Drake*, 89 Fed. (2nd) 47, the following statement is contained:

"The appellant, when all events were fresh in the minds of those who saw and knew, investigated the injury unhampered by rules of evidence, and found the injury accidental and issued its check 'in partial settlement' of the claim. And such admission against interest was competent evidence. *London Guarantee & Accident Co. vs. Woelfle* (C. C. A.), 83 F. (2d) 325; *Northern Pac. Ry. Co. vs. Helvering* (C. C. A.), 83 F. (2d) 508; *Nevin vs. Mercer Casualty Co.*, 12 Cal. App. (2d) 222, 55 P. (2d) 251; *Farmers', etc., Bank vs. Stowell*, 6 Cal. App. (2d) 373, 44 P. (2d) 392."

In the case of *Krebs Pigment & Chemical Co. vs. Sheridan*, 12 F. Supp. 254, it was held on the issue of whether a certain barge was sea-worthy, that the payment of the insurance loss by the underwriter was an admission that the barge was sea-worthy.

As a matter of public policy, Minnesota, as well as other jurisdictions, has set up a conclusive presumption that where there is no express admission of liability as a part of the negotiations for settlement of an unliquidated claim, the evidence of such negotiations or the settlement pursuant thereto shall not be received in evidence as an admission against

interest, this to encourage settlements and avoid litigation. *Bartels vs. Schwake*, 153 Minn. 251, 190 N. W. 178. There is no case in Minnesota which puts situations like the one here involved, to-wit, a payment in full of a liquidated claim, the amount of which is fixed by statute, within this exception to the general rule, even though, at the time of such payment in full, there is an express denial of liability, generally or on any specific ground. The only Minnesota case dealing with the problem at all is *Person vs. Bowe*, 79 Minn. 238, 82 N. W. 480. This was a case involving a suit by a farm laborer for wages. The complaint alleged that the plaintiff worked for the defendant for seven months, at the agreed price of $17 per month; that no part of his wages had been paid except $10. The answer alleged that the plaintiff agreed to work for the full term of eight months, for $16 per month for the first four months and $18 per month for the last four months, and that the plaintiff abandoned the contract at the end of a seven-month period, and that he had been paid $15 on account.

Over the defendant's objection, the plaintiff introduced evidence to the effect that "when the plaintiff demanded his pay for his services, the defendant said that he could not then pay, but would let the plaintiff have $20, and would pay the rest about the middle of November; that, if the plaintiff 'would throw off $5,' he would at once pay the claim." The Court said:

> "It is here urged that this was reversible error, for the reason that it violated the rule that an offer to compromise a disputed matter is not admissible in evidence against the party making the offer. The evidence objected to was not within this rule; for it did not relate to any matter then in dispute between the parties, or to any attempt to compromise a disputed claim. On the contrary, it was an offer of a present payment of a then undisputed claim, if the proposed discount was allowed. The evidence was competent and relevant upon the issue

whether the contract was for seven months' service, as claimed by the plaintiff. It tended to show an indirect admission on the part of the defendant that the plaintiff had performed his contract; for, if true, no claim was made to the contrary by the defendant when the demand for payment was made."

In 22 *Corpus Juris*, ~~Sec. 354, p. 320~~, 31 Secundum, Section 292, p. 1055 cited by the Circuit Court of Appeals in its opinion, we find this statement:

> "(That an admission against interest) may be shown as an implied admission, that the party claimed to be subject to a certain liability has *paid* the claims of others who were in the same position as the claimant."

The same authority proceeds to distinguish between payment and compromise settlement by saying:

> "* * * but a *compromise* between a party and a third person cannot be shown * * *."

As to the first point made with respect to the distinction between payment and compromise settlement, *Corpus Juris* at that point cites a long list of cases under Note No. 14, one of which is sufficient for our purpose. See *Michigan Mutual Home Insurance Co. vs. Pere Marquette Ry. Co.*, 193 Mich. 429, 160 N. W. 599.

See also *Altman vs. Boston & N. St. Ry. Co.*, 75 New Hampshire 573, 17 Atl. 616, and *Davison vs. American Cent. Ins. Co.* (New Hampshire), 119 Atl. 703; also, *Colburn vs. Town of Groton* (New Hampshire), 28 Atl. 95.

(c) We respectfully submit that the general rule with respect to admissions against interest is so clear that the exception grafted upon that rule with respect to compromises "to purchase peace" cannot be extended to include the instant case, without specific Minnesota authority to that effect, without violating each of the following, to-wit:

Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

The decisions cited under I-(b) of this petition.
Rule 43 (a) of the Federal Rules of Civil Procedure.

(d) We shall now discuss the *Guile* case, upon which the Circuit Court of Appeals relied expressly for the reversal of the lower Court, stating, in that regard:

> "On the other hand, we think the rule applied in the *Guile* case requires the exclusion of Exhibits T and U in the present case."

We repeat the language concerning this case which we used in our petition for re-hearing in the Circuit Court of Appeals:

> "We come now to the Minnesota cases, and first to *Guile vs. Greenberg,* 257 N. W. 649, which this Court relied on to justify its reversal of the lower court because of the admission in evidence of Exhibits T and U. Concerning this case, the majority opinion correctly points out that in the Guile case, the *plaintiff's* doctor testified that plaintiff's arm was disabled ten per cent and his leg twenty-five per cent; that the evidence offered in that case by the *defendant* corroborated the *plaintiff's* doctor as to the extent of the disability, but that the evidence with which the appeal was concerned also contained objectionable matter relating to the fact of workmen's compensation, which Guile had previously collected, for the same injury, and quotes the language of our Minnesota Supreme Court to the effect that:
>
> > 'Since the only effect of introducing evidence of this previous agreement was corroborative it should not have been admitted, inasmuch as its propensities for damaging plaintiff's case were so clear.'
>
> What this Court failed to note was that in that case, *the defendant* had not offered any evidence whatsoever to *contradict* the plaintiff's doctor as to the extent of the injury and that therefore there was no occasion for corroboration. That is the vital distinction between that case and ours. In our case the question of whether or not Sullivan was acting in the course and within the scope of his employment was an issue in the case from

the beginning to the end; in fact, as this Court said in its opinion:

> 'This case presents a single question, namely, was Ed Sullivan an employee of the appellant acting within the scope of his employment when, as a result of his alleged negligence, he and Wm. Levy, appellee's decedent, were both killed in the same accident?'

That this distinction was clear in the mind of the Minnesota Supreme Court in the Guile case is indicated by another quotation from that opinion by this Court, when it referred to the Court's instructions as to the procedure on the new trial, as follows:

> 'On the new trial, the proper procedure would seem to be to withhold this matter from the jury until the very end of the trial. If by that time plaintiff either has claimed the disability to be other than what was previously agreed to, or if plaintiff has not admitted the percentage of his disability in open court or established the same by his own case, then the proffered evidence should be received, despite its damaging effect on plaintiff's case,' * * *

What the Minnesota Supreme Court said in effect was:

a. There is no objection to corroboration by the defendant of plaintiff's claim, even though the corroboration comes from the mouth of the defendant.

b. Such corroboration when coupled intrinsically with improper damaging evidence against the plaintiff, should not be received where it is not necessary for corroborative purposes.

c. If it becomes necessary to contradict the plaintiff, as distinguished from corroborating him, then the evidence containing the damaging characteristics with respect to compensation insurance may nevertheless be offered by the defendant.

In our case the *defendant* did not purport to corroborate the *plaintiff* as was done in the Guile case where no corroboration was necessary and where the clear purpose was to introduce improper evidence relating to workmen's compensation insurance. In our case, the plaintiff offered evidence to corroborate her own claim upon a live issue. That is to say, upon

whether or not Sullivan was acting within the course and scope of his employment.

We know of no case where a Court has ever said that a party may not produce evidence supporting a claim it makes when controverted by the defendant, even though that evidence comes from the mouth of the defendant.

When this Court points out that, 'in this case as in the Guile case, the alleged admission is corroborative of other competent and admissible evidence, evidence tending to show Sullivan was acting in the course and scope of his employment at the time of the accident,' the Court *seems to* have missed the point that this corroboration related to a point *still in dispute*, the point being the question of Sullivan's *agency*. That point was in dispute to the end of the case and even in the Circuit Court of Appeals.

This Court then gives its reason for the statement above quoted and says:

> 'this is true because there is substantial evidence in the record introduced by plaintiff tending to show that at the time in question, Sullivan was an employee of the defendant,' etc.

Of course there was substantial evidence on the question in the record, but that issue was *still* an issue. It was still being disputed and evidence was offered by the defendant to prove the contrary of the plaintiff's position in this regard. When the Court completes that paragraph by saying:

> 'and the admission of that fact by the defendant implied in the payment made to Sullivan's dependents is merely corroborative,'

the Court does two things:

a. The Court agrees with us that the payment made to Sullivan's dependents was an implied admission of the fact, and

b. The Court stated this was merely corroborative. With respect to 'b,' that this was merely corroborative, we respectfully submit that the Court has inadvertently made a statement which it will undoubtedly wish to correct. From the context it would appear

this Court intended to hold that on a *disputed* issue of fact the plaintiff cannot prove an admission by the defendant, corroborating the plaintiff's position, and this upon the authority of the Guile case, which says no such thing. The Guile case merely says that upon a point concerning which there is no contradiction—in other words, upon a point concerning which there is no issue, one may not introduce evidence to corroborate his opponent's position (where it is thus not needed) if, in the process of doing so, he at the same time unjustly injures his opponent by introducing prejudicial testimony on collateral matters * * *."

(e) Nowhere does the Circuit Court rely on any Minnesota law as the basis for its reversal, excepting only the *Guile* case, which, we respectfully submit, does not justify the exclusion but, on the contrary, supports the lower Court in receiving the exhibits.

The Circuit Court's quotation of federal authorities on the subject of compromise settlement, as stated, all have to do with "purchase of peace." None of the cases refer to a *voluntary* payment of the full amount of a claim, liquidated by statute. The amount of the payment here was $6,401.85. We respectfully submit that it cannot be asserted with propriety that anyone may be conclusively presumed to have "purchased peace" by the payment of so large a sum, when that sum is not one penny less than the full amount which could have been recovered had litigation proceeded. We suggest that the scarcity of cases involving this specific point must be due to the fact that it could not occur to anyone that such a payment, under such circumstances, even though coupled with a specific denial of liability, could ever be treated, for the purposes of the reception of evidence, as being within the class of cases excluded by reason of their being presumptively a "purchase of peace."

(f) Even in the case of compromise settlements, you find

that this exception is not all-inclusive. It is the rule that if there is an admission of liability in connection with negotiations for the "purchase of peace," the evidence may come in. Generally, on this subject, see cases under Note 80 *A. L. R.*, commencing at page 929.

(g) Although the Circuit Court did not base its opinion upon the ground that there was a distinction between a *direct* admission and an *implied* admission, we feel that, this being a petition for writ of certiorari, it may be necessary to exclude the innuendo raised by the Court. What the Court said was this:

> "Assuming, but not deciding, that the same rule of competency applies both to the admissibility of an expressly agreed incidental fact involved in a proceeding in another tribunal and to a fact in issue but implied only from the settlement and payment of a claim filed in a proceeding pending before another tribunal, still we are of the opinion that the decision in the Guile case does not support the appellee's contention. On the other hand, we think the rule applied in the Guile case requires the exclusion of Exhibits T and U in the present case" (R. 177).

That there is nothing to this innuendo is determined by Minnesota cases. The Supreme Court of Minnesota, in the case of *Sonnesyn vs. Hawbaker,* 127 Minn. 15, 148 N. W. 476, said:

> "Defendant assigns as error the reception of 'Exhibit D,' a letter written by plaintiff to defendant making demand for the amount claimed, and stating the ground of his demand. This was properly received. Where a demand is made upon a party under such circumstances that he would naturally deny if he did not assent, the demand and failure to reply may be received as evidence in the nature of an admission tending to prove the justice of the demand. 1 *Greenleaf, Ev.,* No. 197; 2 *Wigmore, Ev.* 1073; *Murphey vs. Gates,* 81 Wis. 370, 51 N. W. 573."

In the case of *George H. Thaden vs. Francis Bagan, et al.,* 139 Minn. 46, 165 N. W. 864, the Minnesota Supreme Court, in the suit to recover commissions for the sale of farm lands on claim in the amount of $3,000 and interest, said:

> "Plaintiff's cause of action accrued in March, 1911. His claim was for $3,000 and interest. It was a 'credit' which was required to be listed by the plaintiff by the tax law. G. S. 1913, 2316, *et seq.* The defendants proposed showing whether it was listed. It sought to do this by going to the lists in the possession of the county auditor and by taking the plaintiff's statement, when on the stand, as to the fact. That a showing that the plaintiff did not list his claim as a credit was proper as an admission of non-ownership is not open to question. *H. C. Jaquith Co. vs. Shumway's Estate,* 80 Vt. 556, 69 Atl. 157; *Fudge vs. Marquell,* 164 Ind. 447, 72 N. E. 565, 73 N. E. 895; *Whitfield vs. Whitfield,* 40 Miss. 352."

(h) The effect of Rule 43 (a) of Federal Rules of Civil Procedure has a bearing on the admissibility of Exhibits T and U. See *Boerner vs. United States,* 117 Fed. (2nd) 387, dealing with the question of implied admission where the evidence was "only cumulative." After full discussion the Court said with respect to the state decisions:

> "in any event, they do not limit us, for we are directed by Federal Rule 43 (a), 28 *U. S. C. A.,* following section 723c, to follow that holding on evidence, whether state or federal, which most favors admissibility."

Concerning this rule, the Court in *Ulm vs. Moore-McCormack Lines, Inc.,* 117 Fed. (2nd) 222, said:

> "It would be support of a trap for the unsuspecting, were we to affirm a harsh exclusionary ruling, contrary to modern trends in the law of evidence, particularly as emphasized by Federal Rule 43 (a), 28 *U. S. C. A.,* following section 723c, merely because the lily was not thus gilded."

(i) The concurring opinion of his Honor, Judge Reeves

(R. 178), refuses to accept the grounds asserted for the majority opinion. He arrives at the same conclusion by assigning entirely different grounds.

Again, because this is a petition for a writ, we feel the need of showing, as we respectfully suggest we shall, that the reasons assigned in the concurring opinion are also without merit as a basis for excluding Exhibits T and U. The language we used in our petition for re-hearing is equally pertinent here, and we quote from that petition, as follows:

> "We now come to the minority opinion of Judge Reeves. This opinion discusses the problem as though we were concerned solely with the rule concerning the admission of a *pleading* in another case containing an admission of fact on a particular issue.
>
> Passing the discussion of the merits of this point for a moment, we respectfully submit we are here primarily concerned, not with the admissibility of the pleading, but of the proof of a fact, that being the fact of payment in full to the Sullivan dependents of their compensation claim under the Minnesota compensation statutes. The exhibits offered in connection with the receipt of payment in full were offered to present the entire record. The only objection to this record was that it was proof of a compromise settlement. If there had been an admission by the defendant that it amounted to a proposal to pay in full, there would have been no need to introduce anything more than the receipt. The *defendant* was entitled to have the entire record presented, to show that although they paid in full, they pretended to deny liability.
>
> Coming to the question of pleading, as discussed by Judge Reeves. He first cites 22 *Corpus Juris*, page 333, and page 335, but inadvertently omits Section 376 on page 335, which contains the following statement:
>
> 'It has been held that a party is bound by admission contained in a pleading prepared by his attorney, although he did not know of the statements therein, and even though he had no actual knowledge of the existence of the pleading, but the more generally accepted view recognizes a distinction between state-

ments contained in pleadings in another case which are emanations of counsel and those which can fairly be regarded as statements by the party, and as a result, requires, as a condition of admissibility, that the statement be affirmatively connected with the party as one which he has made because it was true.'

Here, there can be no doubt about the authority of the defendant being present before payment of the full amount of the statutory allowance could be made. The mere fact of this payment clearly is sufficient foundation to establish that what was done in connection with that payment, was authorized by the defendant.

The Court refers to *Vogel vs. Osborne*, and says (20 N. W. 129):

'And the rule is just as rigid in Minnesota.'

Since it is recognized that the Minnesota rule is controlling, as to this issue (and here we are talking about the question of the admissibility of pleadings in another action, as admissions against interest), it is important to see whether or not the *Vogel vs. Osborne* case supports the minority opinion or not.

In that case the original answer was signed and verified by the attorney for the defendants. An amended answer was subsequently served which denied the material fact which was admitted in the original pleading. No evidence was introduced to show that the admission in the original answer was made with the knowledge or by direction of the defendants.

The Court said:

'Of course it is elementary that an amended pleading entirely supersedes the original, which ceases to be a part of the record. The original has no longer any existence as a *pleading;* but this is not the question here. Although superseded as a pleading, may it still be introduced in evidence as an admission against the party who interposed it? If it was signed or verified by the party, or if it otherwise affirmatively appears that the facts stated therein were inserted with his knowledge or by his direction, we can see no reason why it is not as competent as any other admission made by him, although it has ceased to be a pleading in the case—not, of course, conclusive, but

subject to explanation. To introduce such evidence when a party has thus changed front is a common practice, and we have no doubt a correct one. And even when the pleading is signed or verified only by the attorney, if the party stands by it by allowing it to remain the pleading in the case, so that it contains a solemn admission of record, it would perhaps be presumed that its allegations of fact were inserted by his authority, and hence admissible against him in other actions.'

Since we are not here concerned with the conclusion which the jury might properly draw from Exhibits T and U, but merely with their admissibility, how can it be said here, that under *Vogel vs. Osborne,* Exhibits T and U were not admissible, even as pleadings, under the language above quoted? Can there be any doubt that the appellant stood by and allowed this pleading to remain in the case and contain a solemn admission and record of payment in full of the claim of the Sullivan dependents for the full amount allowed by statute?

Clearly, *Vogel vs. Osborne* case supports our view and not the view of Judge Reeves.

On the general subject of admission of both pleadings and other evidence, for purposes of impeachment and as admissions against interest, see the discussion in *Tri-State Transfer Company vs. Helen Nowotny, Administrator,* 198 Minn. 537, 270 N. W. 684, at page 543 of the opinion. The Court said:

'There is no dispute that a pleading in one action may be used as an admission against the same party in another action. Likewise, any statement contradictory to one made by a witness on the stand may be used for the purpose of impeachment. The form or nature of the contradictory assertion is immaterial, *i. e.,* it may be oral or written.'

That case cites *Carpenter vs. Tri-State Tel. & Tel. Co.,* 169 Minn. 287, 211 N. W. 463, which holds:

'The complaint in the prior action, though verified and signed only by counsel, was admissible as impeachment of such plaintiff whose testimony sup-

ports the complaint in the second action. Such complaint is admissible as an admission against interest.' To exactly the same effect see *Annie M. Bakkensen vs. Minneapolis St. Ry. Co.*, 184 Minn. 274, 238 N. W. 489.

Judge Reeves refers to the fact that the exhibits in this case did not purport to be signed by appellant but were signed by the insurance company *though using appellant's name.* This is clearly undeterminative of the issue in the light of the foregoing Minnesota cases. Certainly, the pleadings did not admit liability in so many words. They denied that Sullivan was acting within the scope of his employment, but the fact remains that the stipulation was an agreement to pay one hundred cents on the dollar and the receipt shows that it was paid. Why, then, should not the jury have been permitted to say whether or not this payment in full was *intended* to be an admission of liability? Can it be that men pay one hundred per cent of a claim, aggregating $6,401.85, when they really and sincerely believe that they have no liability? No one could assert this. * * *"

In considering the concurring opinion of His Honor, Judge Reeves, it is of significance to point out that the Honorable George F. Sullivan, who tried the instant case in the Court below, was reversed by the same Circuit Court of Appeals in another case because he refused to admit in evidence an unverified pleading under circumstances like those in this case. The case referred to is entitled, *Stolte vs. Larkin*, 110 Fed. (2nd) 226. In that case, the Court also relied upon *Vogel vs. Osborne.* In the instant case, His Honor, Judge Reeves, relies on *Vogel vs. Osborne* for exactly the contrary result. We respectfully submit that the first decision of the Circuit Court, interpreting *Vogel vs. Osborne*, is clearly correct, and that the concurring opinion in this case is clearly wrong.

(j) The Circuit Court of Appeals in its opinion assumes without giving any reasons therefor, that the admission of

Exhibits T and U was prejudicial. Were they not prejudicial and were they inadmissible, the error would have been harmless. It is well therefore to consider the question of whether there was any possible prejudice involved in their reception.

The fact that an insurance company was involved in the compensation claim on the part of Sullivan's dependents could not be prejudicial because there was no necessary relationship between insurance, in that case, and the possibility of insurance in the instant case. Only by the wildest stretch of the imagination could it be said that, since the dependents of Sullivan received an award under the compensation law, the widow of Levy would be more reasonably or more emotionally entitled to recover damages for the wrongful death of her husband.

We respectfully submit that the problem of whether or not there was prejudice in connection with the receipt of these two exhibits, was not sufficiently clear to justify its being passed without comment.

II.

The Determination of the Question Presented Is of Great Importance to the Petitioner, Because of the Serious Damage Which She Suffered by Reason of the Loss of Her Husband, and Because of the Unjust Burden Which Will Be Inflicted Upon Her If the Case Must Be Retried.

III.

The Determination of the Question Presented Is of Public Importance, Because—

(a) It clearly presents the issue as to whether or not a flagrant disregard of the Minnesota rules with respect to the admission of evidence, while asserting that they are being followed, establishes a right to certiorari.

(b) A refusal on the record by a Circuit Court of Appeals to follow an applicable state decision is ground for the granting of a petition for a writ is well settled.

(c) The Circuit Court of Appeals, in the instant case, has effectively accomplished the same result by a manifest misreading of the Minnesota law on the subject, is also clear. We have already adverted to the fact that the Court's construction of *Guile vs. Greenberg*, is clearly erroneous. We have also adverted to the fact that the application of the exception to the rule, concerning admissions against interest in cases of a "purchase of peace," does not cover the instant case.

(d) To permit the decision to remain on the books unchallenged would be extremely confusing to future litigants. By looking at the Minnesota law on the subject of the admissibility of such evidence as Exhibits T and U, one would necessarily come to the conclusion that they are admissible. By reading the present opinion in the instant case, one would find the rule making them inadmissible under Minnesota law. Both cannot be correct, and we respectfully submit the conflict ought to be eliminated.

Respectfully submitted,

JOSIAH E. BRILL,
SAMUEL H. MASLON,
Counsel for Petitioner.

Dated: April 28th, 1942.